

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 27, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP63-FT**

**Cir. Ct. No. 2014FA125**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**KAREN RENEE PERIK P/K/A KAREN RENEE KALLIES,**

**PETITIONER-APPELLANT,**

**V.**

**JACOB D. KALLIES,**

**PETITIONER-RESPONDENT.**

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APPEAL from an order of the circuit court for Juneau County:  
PAUL S. CURRAN, Judge. *Reversed and cause remanded with directions.*

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM.<sup>1</sup> Karen Perik appeals an order of the circuit court modifying the shared physical placement of her minor son, E.K., to award primary physical placement to his father, Jacob Kallies. Perik contends that the circuit court erred in determining that primary placement with Kallies was in E.K.’s best interest because the court took into consideration her pre-divorce extramarital affair. For the reasons discussed below, we reverse the order and remand for further proceedings consistent with this opinion.

### BACKGROUND

¶2 Perik and Kallies were married in June 2011 and jointly petitioned the circuit court for divorce in September 2014. The parties had one child during their marriage, E.K., who was born in February 2012. At the time of the parties’ divorce in 2015, they entered into a settlement agreement that provided for substantially equal placement of E.K., who was then pre-school age. The parties’ settlement agreement was incorporated into their judgment of divorce.

¶3 In 2016, Perik moved the circuit court to modify placement of E.K. to account for the fact that E.K. would be starting school in the fall of 2016. Perik lives in Friendship and Kallies lives in New Lisbon; consequently, the determination of primary placement during the school year would also determine what school district E.K. would attend.

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<sup>1</sup> In a February 2, 2017 order, the court placed this case on the expedited appeals calendar, and the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17. Briefing was complete on March 31, 2017. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 Following a hearing on the parties' motion, the circuit court determined that E.K.'s primary placement during the school year would be with Kallies. Perik appeals. We set forth additional facts, including the specifics of the court's ruling on the parties' motion regarding primary placement, in our discussion below.

## DISCUSSION

¶5 Perik contends that the circuit court erred by considering an improper factor when determining that primary placement of E.K. with Kallies during the school year is in E.K.'s best interest.

¶6 We review a circuit court's modification of a placement order under the erroneous exercise of discretion standard. *Helling v. Lambert*, 2004 WI App 93, ¶7, 272 Wis. 2d 796, 681 N.W.2d 552. We will sustain a discretionary determination if it is based upon the facts in the record and the court relied on appropriate and applicable law. *Id.*

¶7 “[A]lthough a court has broad discretion in making placement decisions, its power is still limited to that provided by statute.” *Id.* WISCONSIN STAT. § 767.41(4)(a)2. provides that a circuit court “shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.” Section 767.41(5) provides that in determining the physical placement schedule, the court shall consider all facts relevant to the best interest of the child, and § 767.41(6) provides that the court shall state why its determination as to physical placement is in the best interest of the child.

¶8 WISCONSIN STAT. § 767.41(5) lists the factors that the court must consider in determining what placement schedule is in the child’s best interest. These factors include: (1) the wishes of the child and parents; (2) the interaction of the child with his or her parents, siblings, or others who may significantly affect the child’s best interest; (3) the amount of time the child has spent with each parent; (4) the child’s developmental needs and adjustment; (5) the child’s age and developmental and educational needs; (6) the child’s physical or mental health issues, if any; (7) any abuse issues; (8) the availability of child care; (9) the ability of each parent to cooperate and facilitate the other parent’s contact with the child; and (10) any professional assessments. Sec. 767.41(5)(am)1.-15.

¶9 In addition to the above factors, the circuit court must also consider “[s]uch other factors as the court may ... determine to be relevant.” WIS. STAT. § 767.41(5)(am)16. However, as we explained in *Helling*, “because freedom of association is constitutionally protected,” a court may not base a placement decision on “a parent’s nonmarital sexual conduct or relationship with a third party absent specific evidence that the conduct or relationship in question has had or would have a significant adverse impact on the child.” *Helling*, 272 Wis. 2d 796, ¶8.

¶10 The circuit court carefully and properly went through the ten specific statutory factors. Relevant here, the circuit court found that both Perik and Kallies had spent substantial amounts of time with E.K. and interacted well with him; that E.K. is well adjusted; that Perik and Kallies are able to communicate and cooperate “remarkably” well with one another and support one another’s relationship with E.K.; and that there are no mental health or abuse issues. As to the availability of child care, the court found that both Perik and Kallies have child care services that “appear to be good.” However, the court favored Kallies on that

factor because Kallies' childcare provider was a center that provided a more school-like environment, whereas Perik's provider provided care in-home. As to E.K.'s interaction with his parents, siblings, and others, the court favored Perik on that factor because Perik has another child with whom E.K. has a positive relationship.

¶11 The circuit court then turned to the final factor, whether there are “[s]uch other factors as the court may ... determine to be relevant.” WIS. STAT. § 767.41(5)(am)16. The court focused on an affair that Perik had during the parties' marriage. The court stated:

There is a related factor [], I think .... Why are we here? Well, we're here because the parties live in different school districts and [E.K. must] go to school in one of them. Why do the parties live in different school districts? Because they got divorced. Why did they get divorced?

Now, one of the things that I have seen every witness essentially say is—and if they didn't say it explicitly, it was implicit in their testimony—these are wonderful parents. They have sacrificed themselves. They have put their child first.

And the only evidence that I've heard today at all about evidence that one of them did not put their child first was the affair. I find it very hard to believe that [E.K.] was on [Perik's] mind when those events were happening.

¶12 In balancing the WIS. STAT. § 767.41(5)(am) factors, the circuit court indicated how close the issues were by referring to the advantage of one or the other parent in terms of “grain[s] of sand” when discussing whether a factor favored one parent over the other. With regard to the factors set forth in subdivisions 1-15, the court found that neither party was favored for all but two factors. Of those two factors, the court found that one weighed in favor of Perik and one weighed in favor of Kallies, both factors by a “grain of sand.” We see no

misuse of discretion in the circuit court's consideration of these factors. *See. e.g., Helling*, 272 Wis. 2d 796, ¶9 (concluding no misuse of discretion in the circuit court's analysis of these factors).

¶13 However, we conclude that the circuit court did err in its consideration of Perik's extramarital affair under the final factor.

¶14 In *Helling*, we concluded that consideration of a parent's nonmarital relationship with a third party is impermissible unless there is a showing that the relationship was harmful to the child. *See id.*, ¶¶8, 17, 20. Here, the court asserted that Perik's affair was evidence that she had not "put [E.K.] first," but the court did not back up that assertion with other findings or evidence. The court did not find that E.K. was harmed in any way by that relationship and there is no evidence in the record to suggest that the child suffered a negative effect. In fact, the court found E.K.'s relationship with Perik's other child, whose father is the man with whom Perik had the affair, was a positive factor in favor of placement with Perik.

¶15 We have considered the possibility that the circuit court implicitly found that, absent Perik's affair, there would have been no divorce and that it was the divorce that had a negative effect on E.K. We conclude that this is not a reasonable reading of the record. First, the circuit court does not express this view. Second, we think it is obvious that affairs are often a result of a bad marriage, not a cause.

¶16 Thus, we conclude there is no basis for a finding that Perik's affair adversely impacted E.K.

¶17 Kallies points to language in *Helling* suggesting that if a court merely comments on an affair in passing, there might be no reason to reverse the

circuit court. *Id.*, ¶19. Kallies argues that this part of *Helling* applies here because the circuit court did not mention the extramarital affair except in passing as a reason for Perik’s move to Friendship. This is not accurate. The circuit court plainly considered the affair as a factor weighing against primary placement with Perik.

¶18 Moreover, it is impossible for this court to discern what placement decision the court would have made had the court not impermissibly relied upon Perik’s affair. Of the other factors considered by the court, the court found that most did not weigh in favor of one parent or the other; and of the two factors that the court determined did weigh in one parent’s favor, one weighed in favor of one parent and one weighed in favor of the other parent by an amount described by the court as “a grain of sand.” And, significantly, the guardian ad litem recommended placement with Perik.

¶19 Accordingly, *Helling* compels the conclusion that the circuit court erred and, so far as we can tell, the improper consideration of the affair tipped the decision in favor of Kallies. The court, therefore, erroneously exercised its discretion. We remand to the circuit court with directions to reconsider the placement decision in this case.

*By the Court.*—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).

